

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN W. LILLARD and DEPARTMENT OF THE NAVY,
NAS CECIL FIELD FIRE DEPARTMENT, Jacksonville, Fla.

*Docket No. 96-497; Submitted on the Record;
Issued January 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a two percent monaural hearing loss of his left ear for which he was granted a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office representative.

On February 13, 1995 appellant, then a 52-year-old fire fighter supervisor, filed a notice of occupational disease claiming a hearing loss in the left ear, acute tinnitus, and ringing of the ears caused by noise exposure in the course of his federal employment. He stated that his hearing problems resulted from 25 years of working in and around jet aircraft engines and working on air fields and aircraft carriers.

The employing establishment furnished the Office with copies of appellant's job descriptions, appellant's audiograms performed at its establishment, and records of noise exposures experienced by appellant during his employment.

On April 12, 1995 the Office referred appellant, together with a statement of accepted facts and the medical evidence, to Dr. Stanton Hudmon, a Board-certified otolaryngologist, for a complete otologic evaluation and audiometric testing. In a May 9, 1995 report, Dr. Hudmon provided a history of noise exposure at work and stated that audjornetric evaluation reflected a "bilateral, high frequency sensorineural hearing loss with a dip at 6,000 cycles in both ears." Dr. Hudmon opined that the sensorineural hearing loss was typical of a noise-induced hearing loss and that appellant was exposed to sufficient noise in his federal civilian employment to have caused the loss. He stated maximum medical improvement had been reached. Dr. Hudmon also recorded appellant's complaints of tinnitus and attached results of the audiogram which noted tinnitus. Dr. Hudmon also diagnosed tinnitus. The audiogram results showed a hearing loss in the left ear at 500, 1,000, 2,000 and 3,000 cycles per second of 20, 15, 10 and 60 decibels, respectively, and a hearing loss in the right ear at those cycles of 20, 15, 10 and 20 decibels.

Dr. Hudmon subsequently found a 0 percent impairment in the right ear and a 1.9 impairment in the left ear.

An Office medical adviser reviewed Dr. Hudmon's report and audiometric test results and concluded that appellant had a noise-induced, high frequency sensorineural left monaural hearing loss. After applying the Office's current standards for evaluating hearing loss to the May 9, 1995 audiology tests, the Office medical adviser determined that appellant had a 0 percent monaural hearing loss in the right ear and a 1.875 percent monaural loss in the left ear.

On May 25, 1995 the Office accepted appellant's claim for a hearing loss of his left ear. Appellant filed a claim for a schedule award on May 30, 1995.

By decision dated July 7, 1995, the Office granted appellant a schedule award for a two percent loss of hearing in the left ear. The period of award ran for 1.04 weeks from May 9, 1995, the date of Dr. Hudmon's examination, until May 16, 1995.

In a letter postmarked August 8, 1995, appellant requested an oral hearing.

By decision dated August 28, 1995, the Office found that since appellant's request for a hearing was not postmarked within 30 days of its July 7, 1995 decision, he was not entitled to a hearing as a right. Moreover, the Office exercised its discretion and denied appellant's hearing request because the issues presented could be resolved upon reconsideration.

On September 20, 1995 appellant requested reconsideration. In support, appellant submitted an audiogram dated September 20, 1995 which was not reviewed by a physician. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 10, 20, 20 and 20 decibels; left ear 20, 25, 25 and 50 decibels.

In a decision dated November 20, 1995, the Office reviewed the merits of the case and denied the claim inasmuch as the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office indicated that the findings of Dr. Hudmon, as correlated by the Office medical adviser, outweighed the audiogram submitted by appellant on reconsideration because it was not accompanied by a physician's opinion. The Office further noted that tinnitus was considered by Dr. Hudmon and the Office medical adviser.

The Board finds that appellant has no more than a two percent monaural hearing loss in his left ear for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act¹ and the implementing federal regulations² set forth the number of weeks of compensation to be paid for permanent loss of the member, functions and organs of the body listed in the schedule.³

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.304.

³ 5 U.S.C. § 8107.

However, neither the Act nor the regulations specify the manner in which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.⁴ The Office has determined that a single set of tables should govern all claimants, in order to maintain consistency and to ensure equal justice under the law.⁵

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second.⁶ The losses at each frequency are added and averaged. A “fence” of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday sounds under everyday listening conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss.⁷ The Board has concurred in the Office’s use of this standard for evaluating hearing losses for schedule award purposes.⁸

In the instant case, the Office properly used Dr. Hudmon’s report and the accompanying results of the audiogram performed on his behalf, in determining the extent of appellant’s hearing loss. Testing for the right ear revealed decibel losses of 20, 15, 10 and 20 respectively. These decibel losses were totaled at 65 and divided by 4 to obtain the average hearing loss at those cycles of 16.25. The average of 16.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0 decibels for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed decibel losses of 20, 15, 10 and 60 respectively. These decibel losses were totaled at 105 decibels and divided by 4 to obtain an average hearing loss at those cycles of 26.25. The average of 26.25 was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25 decibels which was multiplied by the established factor 1.5 to compute a 1.88 percent loss of hearing for the left ear. Accordingly, pursuant to the Office’s standardized procedures, the Office medical adviser determined that appellant had a nonratable hearing loss in his right ear and a two percent monaural loss of hearing in his left ear.

The Board finds that the Office medical adviser applied the proper standards to the findings stated in Dr. Hudmon’s May 9, 1995 report and the accompanying audiometric evaluation. This resulted in a calculation of a two percent monaural hearing loss in the left ear. The right ear was not ratable under these standards and, therefore, not compensable. Moreover,

⁴ See *Donald A. Larson*, 41 ECAB 947 (1990); *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁵ *Id.*

⁶ A.M.A., *Guides*, pp. 224, 225 (4th ed. 1993).

⁷ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The less loss is multiplied by five, then added to the greater loss, and the total is divided by six to arrive at the amount of the binaural loss. FECA Program Memorandum No. 272 (issued February 24, 1986); see also *Danniel C. Goings*, *supra* note 4.

⁸ See *Donald A. Larson*, *supra* note 4.

contrary to appellant's assertion, the September 20, 1995 audiogram submitted by appellant on reconsideration is insufficient to establishing any additional hearing loss as it was not reviewed by a physician.⁹

With respect to tinnitus, or ringing of the ears, the A.M.A., *Guides* provide that such impairment is not measurable, except to the extent to which the tinnitus causes a disturbance in the inner ear and causes vestibular disequilibrium or vertigo.¹⁰ The A.M.A., *Guides* also provide for a percentage of five percent impairment where the presence of tinnitus is shown to impair speech discrimination.¹¹ Since there is no objective findings of disequilibrium or effect upon speech discrimination, appellant has not established a case for compensation on account of his tinnitus.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made with the requisite 30 days. Moreover, 20 C.F.R. § 10.131(b) affords appellant, in lieu of a hearing, an opportunity for a review of the written record by an Office representative if such a request is made within 30 days after the date of the issuance of a decision.¹²

In the present case, the Office issued a decision dated July 7, 1995, but appellant's request for a hearing was not postmarked until August 8, 1995, more than 30 days after the decision. Since appellant's request for a hearing was not postmarked within 30 days of the Office's July 7, 1995 decision, he was not entitled to a review of the hearing as a matter of right.¹³

Even when the request for a hearing is not timely, the Office has discretion to grant the request, and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and it was denied on the basis that additional evidence on the issue of causal relationship may be fully considered through a reconsideration application. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken

⁹ *Joshua A. Holmes*, 42 ECAB 231 (1990).

¹⁰ A.M.A., *Guides* 224, 228.

¹¹ *Id.*

¹² *See* 20 C.F.R. § 10.131(b).

¹³ 20 C.F.R. § 10.131(a).

which are contrary to both logic and probable deductions from established facts.¹⁴ There is no evidence of an abuse of discretion in the Office's denial of appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated November 20, August 28 and July 7, 1995 are hereby affirmed.

Dated, Washington, D.C.
January 6, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).